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IN THE

Supreme Court of the United States

October Term, 1960

No. 735

STANDARD COIL PRODUCTS CO., INC.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Standard Coil Products Co. Inc., respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the First Circuit entered in this case on February 2, 1961 issuing a writ of mandamus upon petition by the Government directing that the judgment of acquittal of petitioner in a criminal proceeding entered in the United States District Court for the District of Massachusetts by direction of the trial judge (Wyzanski, J.) be vacated and ordering that the case be reassigned for a new trial before another judge.

Opinions Below

There was no formal opinion of the United States District Court. The statement by the District Court to the jury in directing the verdict of acquittal is reproduced in Appendix D, pp. 32a-36a.

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix B to this petition, at pages 5a-29a.

Jurisdiction

The order of the Court of Appeals was entered on February 2, 1961 (Appendix C, pp. 30a-31a). On February 28, 1961, Mr. Justice Frankfurter extended the time within which this petition might be filed to March 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).[1]

Questions Presented

1. Whether the double jeopardy clause of the Fifth Amendment of the Constitution of the United States bars a new trial of the defendant for the same alleged federal crime after a judgment of acquittal has been entered in the previous trial before a federal court of competent jurisdiction, where, in the previous trial, a jury was impaneled and sworn, the Government presented evidence for seven days, the trial court directed a judgment of acquittal before the close of the Government's case, the jury was discharged and the defendant was freed.

2. Whether the Court of Appeals has jurisdiction, upon petition by the Government, to issue mandamus directing that a judgment of acquittal entered in a criminal proceeding by order of the trial judge be vacated and directing

[1] The decree of the Court of Appeals issuing mandamus is a final judgment in an independent adversary suit. *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 206 (1924). See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943).

that a new trial be had, when no right of appeal exists from such judgment of acquittal.

3. Did the United States District Court have the power during a criminal trial to direct a judgment of acquittal before the close of the Government's case.

4. Did the United States District Court have the power during a criminal trial to direct a judgment of acquittal before the close of the Government's case where:

(i) Evidence was received for seven days; (Tr. 1-718).[2]

(ii) The trial judge found that the Government's two principal witnesses displayed a "lack of awareness or lack of capacity in connection with their testimonial obligations" (Appendix D, p. 33a);

(iii) The trial judge found that it was prejudicial to the defendants when one of such witnesses changed his testimony with respect to a vital date in the Government's case as a result of a talk with the prosecuting Government attorney during an overnight recess (Appendix D, p. 35a); and

(iv) the trial judge concluded that justice required him to grant the defendants' motion for a judgment of acquittal (Appendix D, pp. 35a-36a).

5. Whether the Court of Appeals in a mandamus proceeding may review and vacate a judgment of acquittal directed by a trial court of competent jurisdiction if it determines that the trial court did so erroneously.

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[2] The reference "Tr." is to the transcript of the trial proceedings.

6. Did the Court of Appeals commit error in determining that the trial judge acted improperly in directing a verdict of acquittal.

7. Did the Court of Appeals commit error in disqualifying Judge Wyzanski from presiding at the new criminal trial directed by the Court of Appeals absent any such request by the Government and without compliance with 28 U.S.C. §144.

Constitutional Provisions, Statutes and Federal Rules Involved

The constitutional provision involved is the double jeopardy clause of the Fifth Amendment, providing as follows:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

The following statutes are involved and are printed as Appendix A to this petition, page 1a:

18 U.S.C., Sections 371 and 1001, under which the petitioners were indicted and tried.

18 U.S.C., Section 3231, conferring jurisdiction upon the District Court.

28 U.S.C., Section 1651(a), under which the Court of Appeals purported to issue its writ of mandamus.

28 U.S.C., Section 144, which provides the conditions for disqualification of a trial judge.

Federal Rules of Criminal Procedure, Rules 29(a), 37(a).

Statement of the Case

Petitioner and two of its employees were indicted by a federal grand jury for alleged violations of 18 U.S.C. § 1001 (concealment of material facts within the jurisdiction of a federal agency) and 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. § 1001). They pleaded not guilty and were placed on trial before a jury in the United States District Court for the District of Massachusetts, which had jurisdiction of the case under 18 U.S.C. § 3231.

The indictment, containing nine counts, alleged a conspiracy to falsify and the falsification of test records and the concealment thereof with respect to radiosondes manufactured by petitioner during the period from September, 1956 to November, 1957 in the performance of two contracts with the Army Signal Supply Agency (Appendix B, pp. 5a-6a). Radiosondes are electronic devices for furnishing weather data (Appendix B, p. 6a).

On September 8, 1960, the trial commenced, the jury was impaneled, and evidence was presented by the Government. On September 20, 1960, after seven days of trial and before the Government had closed its case, upon motions made by the defendants, the trial judge directed a verdict of acquittal of all three defendants (Appendix D, p. 36a). The judgment of acquittal was entered the following day (Appendix E, p. 46a).

In his opening statement to the jury, the Assistant United States Attorney in charge of the prosecution stated that he proposed to present the Government's case in two parts:

> "Before you can follow the testimony about the falsification of the tests you will have to know some-

> thing about the instrument involved, how it was made and how it was to be tested . . . how the tests were supposed to be run" (Tr. Opening to the Jury, 2, 6).

After introducing into evidence the radiosonde contracts, the Government called one Constanz Paliatto, its principal witness, to the stand. Paliatto was the Quality Assurance Representative of the Army Signal Supply Agency (Tr. 7-8) who had personally initiated the complaint and investigation of the alleged wrongdoing (Tr. 362-64) and who was stationed at the petitioner's plant as the chief representative of the Army Signal Supply Agency to supervise the testing and acceptance of the radiosondes during the period of the alleged wrong-doing (Tr. 10-11). The trial court was informed by the Government that Paliatto was being called first as the witness who would establish the proper tests (the aforementioned first part of the Government's case) and that at a later stage in the proceedings he would be recalled to testify as to the alleged falsification of such tests (Tr. 29-30, 383-84, Appendix D, pp. 42a, 45a). Paliatto testified on the first part of the Government's case for more than five days (Tr. 7-566).

The trial judge found, and the Court of Appeals agreed, that Paliatto's testimony was confused and conflicting (Appendix D, pp. 37a, 39a; Appendix B, p. 12a) and according to the trial judge, Paliatto's testimony was not trustworthy and could not be given any credit (Appendix D, pp. 37a, 40a).

During the course of Paliatto's testimony, the trial judge found it necessary to ask him numerous questions to elicit detailed explanations of the complicated testing procedures involved. Paliatto's answers to questions caused the trial

judge on several occasions to caution the witness to think before he testified and to consider more carefully his testimony and its importance in a criminal proceeding (Tr. 117, 139, 159, 299, Appendix D, p. 33a). Every opportunity was given the witness to clarify and explain his testimony, including several recesses declared by the trial judge during Paliatto's direct examination to afford him the opportunity to rehearse his explanations of technical matters with Government counsel (Tr. 65-66, 111, 148). After hearing Paliatto's testimony for more than five days, the trial court found it necessary to remind the witness of the crime of perjury (Tr. 564).

During the course of his testimony Paliatto admitted that all the tapes on which the allegedly falsified test results had been recorded had been delivered to him (Tr. 155 A 5-6) and he had destroyed them—even after he had allegedly become suspicious of the test results and even after he had made his complaints to the F.B.I. (Tr. 364, 369-70).

During the fifth day of testimony, the trial judge conferred with the two Assistant United States Attorneys participating in the trial and the United States Attorney, who joined in the conference at the bench. Judge Wyzanski, an able, skilled and experienced trial judge, recommended to the United States Attorney, in the public interest, that he *nolle prosse* the case against the defendants (Appendix D, pp. 37a-38a). The trial judge at this point further stated that he did "not believe that there is a chance that this Jury will convict these defendants" (Appendix D, p. 43a), and that even if in the unlikely event the jury were to return a verdict of conviction, it would be "almost in-

evitable" that he would have to set aside such a verdict (Appendix D, pp. 40a-41a). After these statements by the trial court, the Assistant United States Attorney took the position that Paliatto, who had testified for five days, was not a principal witness and his testimony was not necessary to prove the Government's charge of fraud (Appendix D, pp. 41a-42a). This was a complete reversal of the position taken by the Government's counsel in his opening to the jury where he told the jury that the testimony to be given as to the proper test procedures was necessary "(b)efore you can follow the testimony about the falsification of the tests. . . ." (Tr. Opening to the Jury, 2, 6). Despite the trial court's recommendation, the Government decided to proceed with the trial.

The next principal witness called by the Government was one Rosenholm, a former employee of petitioner, who identified himself as the "final inspector of" radiosondes (Tr. 600, Appendix B, pp. 7a-8a). This witness had been named as a co-conspirator but not as a defendant (Tr. 668). During the direct examination of Rosenholm, the trial judge considered terminating the proceedings on his own motion because of the actions of the prosecuting attorney (Tr. 677). The judge had previously considered declaring a mistrial during the course of Paliatto's testimony for the same reason (Tr. 155 A 32).

The trial judge found, and the Court of Appeals agreed, that Rosenholm's testimony was conflicting (Appendix D, p. 35a; Appendix B, p. 12a), and according to the trial judge his testimony, as Paliatto's, exhibited a "lamentable lack of awareness or lack of capacity in connection with [his] testimonial obligations" (Appendix D, p. 33a).

At one point in his testimony Rosenholm retracted and completely changed an important segment of his prior testimony upon which the Government based in part its charge of fraud (Compare Tr. 672-75 with Tr. 667). It was following this admission of invented testimony that Rosenholm also changed his testimony with respect to the date of an alleged conversation with a representative of petitioner in order to bring the date within the period of the indictment (Compare Tr. 693 with Tr. 681). The date of this conversation was material since the Government's theory was that the concealment of fraud charged in the indictment occurred after this conversation in which petitioner's representative was allegedly apprised by Rosenholm of wrongdoing (Tr. 689-90). During cross-examination it was revealed that this change of dates in Rosenholm's testimony was the result of his talk with the Government's prosecuting attorneys that very morning before the trial resumed (Tr. 704-05).

At this point the trial judge excused the jury and after an extended colloquy with Government counsel during which, among other things, Government counsel stated that they had testimony of other witnesses in support of the allegations of the indictment, the trial judge stated that the Court would entertain appropriate motions. The defendants then moved for acquittal (Tr. 707-14). The trial judge recalled the jury and expressed to them his opinion that the testimony of the two principal Government witnesses (Paliatto and Rosenholm) was not reliable; he criticized the action of the prosecuting attorney in talking with Rosenholm so that Rosenholm could change his testimony, and stated that the defendants had been prejudiced in their rights to have a fair trial. The trial judge thereupon in-

structed the jury to return a verdict of acquittal (Appendix D, pp. 32a-36a).

The trial judge then directed the defendants to stand up, and announced: "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free" (Appendix D, p. 36a).

Neither the Government nor the defendants sought an appeal, but on October 28, 1960, thirty-seven days after entry of the judgment of acquittal (after the allowable time for appeal by any party), the Government filed a motion for leave to file a petition for writ of mandamus in the United States Court of Appeals for the First Circuit, which motion was allowed by the Court of Appeals (R. 1-2). The petitioner and the individual defendants were permitted to intervene in the mandamus proceedings in the Court of Appeals and opposed issuance of the writ (R. 55-58).

After receiving briefs and hearing oral argument, on February 2, 1961 the Court of Appeals ordered that a writ of mandamus issue, vacating the judgment of acquittal and remanding the case for a new trial before a different judge of the District Court (Appendix C, p. 30a).

The majority of the Court of Appeals was not certain whether the trial judge had directed a judgment of acquittal because of the quality of the Government's evidence or because the trial judge believed the action of the Assistant United States Attorney had prejudiced the defendants, but held that this distinction was of no consequence (Appendix B, pp. 11a-12a) because in either case the trial court had acted so erroneously under the circumstances that "the judge had no power, that is to say, jurisdiction,

to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that mandamus lies to correct the error" (Appendix B, p. 17a).

The Court of Appeals denied to defendants the defense of former jeopardy when they were to be tried again. The reasoning of the Court's majority opinion was as follows:

> "It will suffice for us to say that from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F. 2d 880 (C.A. 4, 1942)" (Appendix B, p. 22a).

Reasons for Granting the Writ

1. The vital public issue presented by this case is whether a defendant in a criminal proceeding in the federal courts may constitutionally be subjected to the jeopardy of a second trial after he has once been put to trial for the same offense before a jury, seven days of evidence has been presented, and the trial judge has terminated the proceedings before the close of the Government's case by directing a judgment of acquittal.

It is well settled that once a criminal trial has been commenced and the jury impaneled or evidence introduced, the defendant has been placed in jeopardy. *Green* v. *United States*, 355 U. S. 184, 188 (1957). Prior jeopardy, not an error-free judgment of acquittal, is the determining factor in whether a defendant can be retried for the same alleged offense. *Green* v. *United States*, *supra* at 188; *Kepner* v.

United States, 195 U. S. 100, 130 (1904); *United States* v. *Ball,* 163 U. S. 662, 671 (1896).

Only two exceptions to this basic rule are recognized. One is where a conviction has been reversed on an appeal brought by the defendant. *Forman* v. *United States,* 361 U. S. 416, 425 (1960). The second exception is where a mistrial is declared under certain strictly limited circumstances, such as the inability of the jury to agree on a verdict, *Logan* v. *United States,* 144 U. S. 263, 298 (1892), or in cases of compelling necessity, *United States* v. *Whitlow,* 110 F. Supp. 871, 876 (D.D.C. 1953). Certiorari has been granted by this Court to clarify the mistrial-double jeopardy question in *United States* v. *Gori,* 282 F. 2d 43 (2nd Cir. 1960), Supreme Court Docket No. 486.

Neither of these two exceptions to the constitutional command that no person shall be twice put in jeopardy of life or limb applies in this case. The Court of Appeals below conceded that it would not grant mandamus if the new trial ordered by it would be barred by the Fifth Amendment, but it held that the bar of double jeopardy did not apply, relying on *Mitchell* v. *Youell,* 130 F. 2d 880 (4th Cir. 1942) (Appendix B, pp. 21a-22a).

The *Mitchell* case is completely inapplicable. In *Mitchell* the Court of Appeals set aside a sentence and conviction in a state court upon a petition for *habeas corpus* on the ground that the denial of counsel to the defendant violated the Fourteenth Amendment to the Constitution. The Court further stated that double jeopardy would not bar a new trial in the state court. Obviously, the double jeopardy provision of the Fifth Amendment was not applicable in *Mitchell. Palko* v. *Connecticut,* 302 U. S. 319 (1937). More-

over, in the present case, there was an acquittal, not a conviction, no petition was sought by the defendant and there was no constitutional infirmity in the proceedings in the United States District Court.

The decision of the Court of Appeals to the effect that the defendants may be tried again on the same indictment (on the theory that the judgment of acquittal is a "nullity") strikes at the heart of a constitutional right which is fundamental to our concepts of justice. It contravenes the "elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous". *Green* v. *United States*, 355 U. S. 184, 188 (1957).

This Court should [illegible] whether the Fifth Amendment guarantees that a defendant who has been placed in jeopardy before a court of competent jurisdiction and expressly acquitted of the crime charged by that court shall thereafter be free of further prosecution for the same alleged offense.

2. The question of double jeopardy in this case presents another facet of the issue of double jeopardy now before this Court in the case of *Gori* v. *United States*, Supreme Court Docket No. 486. The decision of the Court of Appeals in the *Gori* case is reported at 282 F. 2d 43 (2d Cir. 1960). In the *Gori* case, the Court of Appeals for the Second Circuit held that where a criminal trial was terminated in the District Court before the close of the Government's case by a mistrial declared by the trial judge who was acting to protect the rights of the defendant, the defendant could be tried again for the same offense and the bar of

former jeopardy did not apply notwithstanding the mistrial was without the defendant's request or express consent.

In the present case, the criminal trial in the District Court was also terminated before the close of the Government's case, but here by a judgment of acquittal directed by the trial judge with the intention of having the bar of double jeopardy attach.

This Court should determine whether the Fifth Amendment bars a new criminal trial for the same alleged federal offense where the previous trial has been terminated by the trial judge prior to the close of the Government's case with the intention of barring further jeopardy to the defendants and the defendants had not requested nor consented to the termination of such prior trial on any basis other than that further prosecution for the same offense be forever barred.

3. This case also presents an important question in the administration of justice in criminal proceedings in the federal courts: whether a judgment of acquittal by a court of competent jurisdiction can be attacked collaterally by mandamus upon petition by the Government where the Government has no right of appeal from such judgment.

The majority opinion of the Court of Appeals stated that there was no case in point to support its affirmative holding on this question. (See Appendix B, p. 21a).

Petitioner submits that the decision of the Court of Appeals in the instant case is in conflict with *United States* v. *Weissman*, 266 U. S. 377 (1924) where this Court held that the Government could not obtain appellate review of a judgment of not guilty directed by the trial judge after the

jury had been impaneled and sworn, but before *any* evidence had been presented. Writing for a unanimous court, Justice Holmes stated at page 379:

> "Furthermore, if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury were there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary in order to justify directing a verdict of not guilty; there are other cases in which it is done."

It is amazing that neither the majority nor concurring opinions of the Court of Appeals mention the decision of this Court in *United States* v. *Weissman, supra*, despite the citation and argument to the Court of Appeals by both the Government and the defendants of the *Weissman* decision.

The decision of the Court of Appeals below permitting a collateral attack by the Government on a judgment of acquittal entered by a court of competent jurisdiction is in conflict with the principle enunciated in *Ball* v. *United States*, 163 U. S. 662 (1896) at 669-70, where the Court stated:

> ". . . if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. . . . If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. *United States* v. *Sanges*, 144 U. S. 310."

The decision in the instant case is also in conflict in principle with the decision of the Court of Appeals for the Ninth Circuit that the Government has no right of appeal in a criminal case in which the trial court has dismissed the case prior to the introduction of any evidence, where such dismissal "is equivalent to a judgment founded upon a directed verdict of acquittal." *Heath* v. *United States,* 260 F. 2d 623, 632 (9th Cir. 1958).

The decision of the Court of Appeals below is also in conflict with the earlier decision of that court in *Ex parte Farrell,* 189 F. 2d 540, 545 (1st Cir. 1951). Chief Judge Magruder, writing for the court in the *Farrell* case, stated (at page 545):

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its authority to issue a writ under the 'all writs' section, 28 U.S.C. §1651, the only effect of which would be to avoid those conditions and thwart the congressional policy. [Citing cases] For us to grab hold of the present case under 28 U.S.C. §1651 would not be in aid of our appellate jurisdiction elsewhere granted by law, but would be a palpable evasion of the statutory conditions which Congress has seen fit to impose upon our exercise of appellate jurisdiction in this class of cases."

The Government's right to appellate review in a criminal case is strictly limited to the instances specified by statute. *Carroll* v. *United States,* 354 U. S. 394, 399-402, 407-408 (1957).

The "all writs" statute, 28 U.S.C. §1651(a) limits the jurisdiction of the Court of Appeals to issue a writ of

mandamus only when it is in aid of its jurisdiction and agreeable to the usages and principles of law. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943).

A judgment of acquittal having been entered by a court of competent jurisdiction and there being no right of appeal therefrom, there was no appellate jurisdiction in aid of which the Court of Appeals could issue a writ of mandamus. *United States* v. *Weissman*, 266 U. S. 377 (1924). See *Ex parte Pennsylvania*, 137 U. S. 451 (1890).

After the judgment of acquittal was entered, there was no actual or potential appellate jurisdiction remaining in any appellate court. Any possible basis for appeal expired when the statutory time of thirty days in which to appeal had passed, the Government having applied for the writ thirty-seven days after the judgment of acquittal was entered on September 21, 1960.

If a Court of Appeals is free to review and vacate a judgment of acquittal by use of mandamus, a new and revolutionary concept with obvious widesweeping implications is introduced into our federal criminal law. Defendants who have been acquitted by courts of competent jurisdiction will be compelled to "live in a continuing state of anxiety and insecurity," never knowing when the Government may choose to use "its resources and power" to repeat the attempt to convict. *Green* v. *United States*, 355 U. S. 184, 187-88 (1957).

4. Another question of great importance presented by this case is the power of a federal trial judge to control the conduct of a criminal trial.

The Court of Appeals holds that the direction of a verdict of acquittal by a federal trial judge prior to the close of the Government's case is subject to review, although conceding that the direction of a verdict of acquittal by a trial judge after the close of the Government's case is within his power and not subject to review. (See Appendix B, pp. 16a, 17a.) The Court of Appeals held that for lack of such power the judgment of acquittal directed by the trial judge was a nullity.

The present decision conflicts with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), which held that the District Court could properly direct what was in effect an acquittal, even before the introduction of any evidence, for such reasons as the judge felt would prevent prejudice to defendants on trial, after ascertaining that the Government had lost certain evidence taken from the defendant and important to the defense of the case. (The present case is analogous to *Heath*, in that here the Government's key witness, Paliatto, admitted destroying the allegedly falsified test tapes, which evidence was important to the defense.) (Tr. 364, 369-370).

The decision of the Court of Appeals below is also clearly in conflict with the decision of this Court in *United States* v. *Weissman*, 266 U. S. 377 (1924). See also *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D.D.C. 1956). (Trial judge has power to entertain and grant motion for acquittal before close of Government's case.)

Petitioner contends that a federal trial judge in a criminal proceeding has and always has had the inherent power

to direct an acquittal at any time that he concludes that justice so requires. Rule 29(a) of the Federal Rules of Criminal Procedure (relating to directed judgments of acquittal for insufficiency of evidence) does not take away that power. *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D.D.C. 1956).

A federal trial judge is charged with the responsibility of insuring that criminal proceedings are conducted with solicitude for the essential rights of the defendants. *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). If the federal trial judge is to discharge that responsibility fully, he must be vested with the concomitant power necessary to perform that function, including the power to terminate a trial whenever he decides that justice so requires. The trial judge must be able to order an acquittal when it appears that further trial would be unfair and unreasonable, even if another judge or court might disagree with his decision. In the apt words of Judge Aldrich, concurring in the opinion of the Court of Appeals in this case, "It is not always necessary to eat the whole of an egg to know it is rotten" (Appendix B, p. 25a).

This Court should determine whether a federal trial judge in a criminal proceeding has the power to direct a judgment of acquittal at any stage of the proceedings if in his opinion, correctly or mistakenly, justice will be served thereby.

5. Another important question in the administration of justice in the federal courts which this case presents, is whether an appellate court can deem a District Court judge

biased and therefore disqualify him from presiding at a new trial ordered by it when no request for such disqualification has been made by a party to the trial and there has been no compliance with the provisions of 28 U.S.C., §144.

The Court of Appeals in this case although acknowledging that the Government did not request the disqualification of Judge Wyzanski from presiding at the new trial which it ordered, nevertheless directed that a different judge preside at the new trial of the defendants because, as the Court of Appeals stated, Judge Wyzanski would not be able to weigh the testimony dispassionately upon the new trial (Appendix B, p. 22a).

The decision of the Court of Appeals is in conflict with *Marquette Cement Manufacturing Co.* v. *Federal Trade Commission*, 147 F. 2d 589 (7th Cir. 1945), in which the Court of Appeals for the Seventh Circuit stated, in referring to the predecessor statute to 28 U.S.C. §144:

> "That this section of the statute must be literally and strictly observed in order to disqualify a judge is not open to question." (147 F. 2d at 592)

In the exercise of its general supervisory power over the federal courts, this Court should determine whether a Court of Appeals may without statutory authority and without the request of either of the parties to the proceeding, disqualify a federal trial judge.

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted in this case. The decision of the Court of Appeals vitiates the constitutional guaranty against double jeopardy and presents serious and important questions with respect to the administration of federal criminal justice.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

Constitution

AMENDMENT V.—DOUBLE JEOPARDY

* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

Statutes

18 U.S.C., SECTION 371—CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C., SECTION 1001—STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or

uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U.S.C., Section 3231—District courts.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States . . . June 25, 1948, c. 645, 62 Stat. 826.

28 U.S.C., Section 1651—Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . . June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 U.S.C., Section 144—Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the

proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29—*Motion for Acquittal.*

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 37(a)—*Taking Appeal.*

. . .

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be

taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5755, Original

In the Matter of

UNITED STATES OF AMERICA,

PETITIONER.

PETITION FOR A WRIT OF MANDAMUS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Elliot L. Richardson, United States Attorney, with whom *George C. Caner, Jr.*, and *Joseph S. Mitchell, Jr.*, Assistant U. S. Attorneys, were on brief, for petitioner.

James D. St. Clair, with whom *Blair L. Perry* and *Hale and Dorr* were on brief, for Standard Coil Products Co., Inc., intervenor.

Samuel E. Angoff, with whom *Grant, Angoff, Goldman & Manning* was on brief, for Robert Knupp and Fong Foo, intervenors.

OPINION OF THE COURT.

February 2, 1961

WOODBURY, *Chief Judge*. This is a petition by the United States for a writ of mandamus directing a judge of the United States District Court for the District of Massachusetts, and also that District Court, to vacate a "Judgment of Acquittal" entered by the judge in a criminal case, to reassign the case for trial, and for such other and further relief as this court may deem just.

A grand jury in the court below returned an indictment in nine counts against Standard Coil Products Co., Inc., an

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Illinois corporation, which at the time covered by the indictment had a manufacturing plant in North Dighton, Massachusetts, and two individuals then employed by it at that plant, one as the Chief of its Quality Control Department and the other at first as a supervisor and later as the foreman in charge of the production of certain electronic instruments to be described presently, charging all three with the offenses of concealing material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of Title 18 U.S.C. § 1001 and § 371. More specifically the charges were that from September 1956 to November 1957 the accused had knowingly and wilfully falsified, and conspired between themselves and with others to falsify, tests of radiosondes[1] being manufactured at the time in the plant at North Dighton under two contracts entered into by Standard Coil Products Co., Inc., with the Army Signal Supply Agency.

Motions to dismiss the indictment were denied and the defendants were set to the bar to be tried by jury on their pleas of not guilty.

One of the two Assistant United States Attorneys who represented the Government at the trial made an opening statement to the jury in which he explained the general nature of the charges laid in the indictment and the evidence he proposed to introduce saying that the presentation of the Government's case would fall naturally into two

[1] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and while floating to earth by parachute to transmit continuous radio signals in Morse Code indicating the temperature, pressure and humidity of the air through which they pass.

parts, the first part consisting of evidence explanatory of the instruments and of the procedures for testing them and the second part consisting of evidence of deliberate and conniving falsification of the tests run on the instruments by the defendants. In carrying out this program the Assistant United States Attorney in charge at the trial called a witness through whom he introduced the contracts and related documents under which the radiosondes were manufactured by Standard Coil Products Co., Inc. He then called the "Quality Assurance Representative" of the Army Signal Supply Agency who had been stationed at the corporate defendant's North Dighton plant during the time involved for the purpose of supervising the inspection of radiosondes by plant personnel. An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney. Moreover, the judge on several occasions, both during direct and cross-examination, ridiculed the witness with respect to his use of words, repeatedly corrected his grammar, and many times admonished him to remember that he should be careful in his statements since he was testifying in a criminal case. As the examination of this witness proceeded the questions and sometimes sharp comments of the judge clearly show that he considered the witness's testimony unworthy of belief.

The Assistant United States Attorney next called a witness who briefly identified certain charts to be used by subsequent witnesses as "chalks" and then called a witness to the stand who identified himself as having been the

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"final inspector of radiosondes" employed by the corporate defendant at its North Dighton plant during the period covered by the indictment.

The direct examination of this witness closely followed the pattern of the direct examination of the government inspector. Toward the end of a day, while still on direct examination, this witness was asked for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date but when pressed for his best recollection he said that he thought the meeting was early in 1958, he believed in February but was not sure. That is to say, he put the date of the conference after the period covered by the indictment. The next morning, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957." The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness saying that he had, the judge remarked that in a criminal case that was not "correct."

A little while later, on cross-examination by counsel for the corporate defendant, the witness admitted that he had changed his testimony as to the date of the meeting as a result of a conference with one of the Assistant United States Attorneys during the preceding over-night recess. The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege." The latter answered that he was unaware of any reason why he should

not talk with his own witness during a recess called in the course of the witness's direct examination and expressed astonishment that the judge should think that there was any impropriety in his having done so. The judge then ordered the witness to leave the courtroom and the Assistant United States Attorney, again having expressed ignorance of any impropriety in what he had done, the judge said, "You will very soon learn," and addressed the Assistant United States Attorney as follows:

> "You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule."

During further colloquy in the same vein the judge said that he did not mean that counsel for the Government were "personally deliberately" doing something they "knew to be wicked," and that he was not "proposing to take any disciplinary action" against them but was only interested in finding out whether the "situation" was one in which he "must respond to a motion." After more colloquy in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved orally for judgment of acquittal. Counsel for the Government strenuously opposed these motions on the ground that the wit-

nesses so far heard were not vital to the case but were primarily intended only to lay the basis for concrete testimony of guilt to follow and that there were many government witnesses in attendance in the courtroom yet to be heard for whose credibility he was ready to vouch. He suggested that the most that should be done would be to strike the testimony of the witness under examination.

At the conclusion of the Assistant United States Attorney's remarks the judge recalled the jury, ordered the witness back to the stand, and opened a statement to the jury as follows:

> "Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney[2] nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers."

Following this the judge implied that he considered the Assistant United States Attorney's conference with the witness during recess a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses so far produced by the Government to be wholly unworthy of belief, saying that both showed on the stand "a lamentable lack of awareness or lack of capacity in connection with their testimonial ob-

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[2] The United States Attorney himself had joined his two assistants in the courtroom during the course of the trial.

ligations" and that the witness then on the stand "has shown either lamentable lack of memory or an extraordinary power of inventiveness."

At the conclusion of his remarks the judge said to the jury that acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free."[3]

We cannot be sure whether the judge directed acquittal of the defendants because he thought the testimony of two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. But whether the judge acted as he did for one reason or for the other, or

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[3] On the next day judgment was entered as follows:

"The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

FURTHER ORDERED that each defendant be, and hereby is, discharged."

for both reasons in combination, we think his action was not only plainly erroneous but beyond his jurisdiction.

The testimony of the two principal witnesses to whom we have specifically referred was certainly confused and conflicting. But, although to an appellate court the record of a trial may be "cold," it can nevertheless be clear; and it is clear from the record before us that the confusion and conflicts in these witnesses' testimony was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination throughout their direct examination.

It is evident that the memories of the Government's witnesses were not entirely reliable, particularly as to details, and it is also evident that they were not masters of the English language. But as every lawyer with trial experience knows, the witness whose memory is clear and sharp, who in court is neither over-awed nor cockily over-confident, and who has the capacity clearly to understand the questions asked and the command of language to answer briefly and accurately is indeed a *rara avis*. Cases can only be tried on the testimony of those who have knowledge of the issues, whoever they may happen to be, and all too often, indeed usually, witnesses, coming as they ordinarily do from the body of the general public, neither think nor speak with the clarity and precision of academicians. For the most part witnesses with only average education and intellectual capacity are the tools with which trial counsel must work as best they can. Moreover, every occupation has its own vernacular. Sailors, doctors, railroad men, engineers, not to omit lawyers, and others too numerous to

mention, more or less unconsciously slip into the vocabularies of their callings. Naturally witnesses can and should be required to explain the words they use. It is hardly necessary, however, to do so with ridicule or caustic criticism, or repeatedly to check a witness's use of words in reasonably common use by reference to the Oxford English Dictionary, or to require strict adherence to the rules of grammar. The bench is not an appropriate rostrum from which to teach the niceties of English grammar and usage.

It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel. No such situation is before us here, however, for the accused were skillfully represented by able and experienced trial counsel who were very well qualified to preserve their client's every interest. We think it would have been far better had performance of that function been left to counsel. Trial judges must not forget that questions from the bench naturally and properly fall with great impact upon ordinary witnesses and that counsel are reluctant to object to questions asked by a judge for fear of giving offense. There can be no even give and take in court between the judge and counsel for counsel on the floor do not stand on even terms with the judge on the bench.

While performance by the trial judge of his function, indeed duty, to see that the truth is elicited ordinarily requires clarifying questions from the bench, and maybe on occasion sharp warnings, it is not his function or duty to take the conduct of a case away from counsel. Counsel,

as in this case, who sees the examination of his witnesses taken over by the judge and led into matters the witnesses were not intended to cover in their testimony and so opened for cross-examination as to those matters by the other side, finds himself in a most difficult and embarrassing situation. In the first place, it is a delicate matter about which counsel think twice to object to any question asked by a judge. In the second place, if counsel objects to a judge's question on the ground that it leads the witness into matters he was not offered to testify about, counsel runs the risk, exemplified in this case, of comment by the judge before the jury implying that he is seeking to cut off legitimate inquiry. On the other hand, if counsel does not object he soon finds his witness floundering and displaying ignorance and, again as in this case, provoking critical comments by the judge either on the witness's intelligence or on counsel's failure to prepare his case.

We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows.

This record provides a prime example of the consequences of over zealous participation in the examination of witnesses by the trial judge, for its is clear that the

judge's sharp persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and over cautious and then confused them into inconsistencies, and in addition disrupted the orderly presentation of the Government's case according to the plan outlined to the jury by the Assistant United States Attorney by taking its witnesses into matters they were not offered to cover in their testimony. Running cross-examination from the bench, particularly during a witness's direct examination, is an innovation in trial practice which definitely does not have the approval of this court.[4]

We are at a loss to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess. We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another. There is nothing wrong that we know of in talking with a witness during intervals in his examination in court. Indeed in *Frazer* v. *United States*, 233 F. 2d 1, 2 (C. A. 9, 1956), counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth.

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[4] If cases are to be tried by the judge instead of by counsel, the rules of procedure will have to be drastically revised.

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The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial.[5] *Berger* v. *United States*, 295 U. S. 78 (1935). Moreover, the judge should have allowed the jury to pass on the credibility of the Government's introductory witnesses and allowed the Government to proceed with the presentation of its concrete evidence of the offenses charged. The question remains as to what, if anything, this court can and should do to correct the trial judge's error.

Certainly the judge's error was prejudicial to the United States. But the United States obviously cannot appeal. Nor may it resort to mandamus as a substitute for appeal. The writ is not available "to correct a mere error in the exercise of a conceded judicial power." *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U. S. 212, 217 (1945). It is available, however, to correct judicial action which is not mere error but usurpation of power, *id.* One of the writ's two traditional uses "both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction." *United States Alkali Export Ass'n, Inc.*, v. *United States*, 325 U. S. 196, 202 (1945). Therefore the distinction to be drawn is between an error in the exercise of a power conferred and an attempt to exercise a power not possessed.

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[5] Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible.

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There can be no doubt of the power of the court under Rule 29(a) of the Federal Rules of Criminal Procedure to order the entry of judgment of acquittal, either on its own motion or on motion of a defendant, as to one or more of the offenses charged in an indictment or information "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." In spite of the clear wording of the Rule, perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal might properly be entered in some situations even before the close of the Government's case, as, for instance, when the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense. But there is no suggestion of any such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Primarily on the basis of two cases to be cited and discussed presently, we think that under the circumstances of the case before us the judge had no power, that is to say, jurisdiction, to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that mandamus lies to correct the error.

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In *Ex Parte United States*, 242 U. S. 27 (1916), the Court held that, practice in certain circuits including this one to the contrary notwithstanding, a district judge in the abscence of statutory authority had no power permanently to suspend a mandatory minimum sentence of 5 years for bank fraud and that mandamus lay to require the judge to vacate his erroneous order of suspension.

In reaching this conclusion the Court adverted to the consequences of holding to the contrary, that is, of holding that an inherent judicial power could thwart a legislative determination of sentence saying:

> "[I]f it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could likewise be implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

A later case of the same name, *Ex Parte United States*, 287 U. S. 241 (1932), is more nearly in point. In that case the Court issued its writ of mandamus ordering a district judge to issue a bench warrant, which he had refused to do in the purported exercise of his discretion, for the arrest of one under an indictment "fair on its face" returned by a properly constituted grand jury. The case cited is par-

ticularly significant in that it shows that issuance of mandamus by this court in the present case would be in aid of our appellate jurisdiction, and also shows, the jurisdictional limits of a trial judge's powers in criminal cases and the necessity for issuing the writ to confine trial judges within those limits.

In the first place, since the Court in the case cited above was expressly exercising the original jurisdiction conferred upon it by § 262 of the Judicial Code (the forerunner of present § 1651(a) of Title (28), we, as an intermediate appellate court, can safely rely upon it as direct authority for our issuance of the writ in aid of our appellate jurisdiction. See Chief Judge Magruder's discussion in *In Re Josephson*, 218 F. 2d 174, 177-180 (C. A. 1, 1954). If, in spite of the fact that an accused may ultimately be found not guilty, the Supreme Court of the United States, in the exercise of its ultimate discretionary jurisdiction to review actions of the inferior federal courts by certiorari, has power in its discretion to issue mandamus to a federal district court ordering the arrest of one properly charged with crime by a grand jury, then this court, in the exercise of its direct appellate jurisdiction, must also have discretionary power to issue mandamus to require a district judge, or court, to permit the United States to at least present its evidence of guilt when an accused properly charged with crime has been brought to trial. There is thus no need for us to consider whether authority to issue the writ in aid of our jurisdiction might also be found in *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943), or *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).

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In the second place the considerations on which the Court relied in *Ex Parte United States*, 287 U. S. 241, 249-251 (1932), for its conclusion that the district judge did not have jurisdiction to deny the Government's petition for a bench warrant for the arrest of one properly charged with crime support our conclusion that the district judge in the situation before us did not have jurisdiction to prevent the United States from going on with the presentation of its evidence of guilt. We have specific reference to the statement on page 250 that a proper indictment returned by a properly constituted grand jury[6] "conclusively" determined the existence of probable cause for holding the accused to answer to a charge of crime and also to the statement on page 249 that the effect of the refusal of the district court to issue a warrant for the arrest of one charged in "an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial. . . . The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result."

These observations, and others we might quote from the same opinion and the cases cited therein, are pertinent here. If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and

[6] We can say the same for the indictment in the case at bar. At least there is no suggestion to the contrary and motions to dismiss the indictment were denied by the district judge.

enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the accused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other. See id. at page 250. Though the situations are different they are clearly comparable.

The industry of counsel and our own research has unearthed no case squarely in point. But if a trial judge does not have the power to prevent the arrest of anyone properly accused of crime, as held in the later case entitled *Ex Parte United States,* cited above, or to refuse for no valid reason ever to try a criminal charge as indicated in the earlier case of the same name, also cited above, it seems to us to follow that a trial judge has no power arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door.

The question of double jeopardy remains for consideration.

Strictly speaking the defense of double jeopardy is not now before us. We can confidently anticipate, however, that the defense will be raised by the defendants by a plea of *autrefois acquit,* or former acquittal, when they are set to the bar to be tried again. Therefore, since issuance of mandamus, when within our power, is discretionary, and

it would be pointless for us to issue the writ if it were a foregone conclusion that the plea of *autrefois acquit* would be good at another trial, it is appropriate here briefly to advert to the defense of double jeopardy. It will suffice for us to say that from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F. 2d 880 (C. A. 4, 1942).

The United States in its application for mandamus has not specifically asked us to order that the case be reassigned for trial before another judge. Nevertheless we shall do so, for we do not see how a judge who has unnecessarily taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately.

Mandamus will issue directing that the judgment of acquittal entered in United States v. *Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as CR. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.*

ALDRICH, *Circuit Judge*, (concurring). If I agreed with the court that one could not be sure of the reason why the district court ordered the acquittal I would have to disagree with its conclusion on the issue of double jeopardy. Since the subject is of some general importance, I state my reasons.

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I cannot think that a court is "without power," that is, "without jurisdiction,"[1] to order an acquittal in the midst of the government's case on the ground that evidence already introduced is so fatally defective that no jury could be allowed to convict. The court assumes, *arguendo*, that it may sometimes be appropriate for a district court to direct an acquittal prior to the closing of the government's case because of some evidentiary defect, but says it is unnecessary to decide. I do not think one can leave this matter hanging, but, rather, I believe its resolution to be all-important.

Not unnaturally, in view of the fact that the government has no general right of appeal, there is a paucity of authority with respect to the right of the court to acquit for evidentiary defects at any preliminary stage. In *United States* v. *Dietrich*, C.C.D. Neb., 1904, 126 Fed. 676, Circuit Judge (afterwards Mr. Justice) Van Devanter said, at pp. 677-78,

> "Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste

[1] The court apparently uses "power" and "jurisdiction" interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term "power."

> of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."

I see no reason to say the court there erred in applying this well-recognized civil principle to a criminal proceeding. See *McGuire* v. *United States*, 8 Cir., 1945, 152 F. 2d 577, 580. In like manner, in *United States* v. *Maryland Cooperative Milk Producers, Inc.*, D. C. D. C., 1956, 145 F. Supp. 151, an acquittal was ordered when facts were stipulated during the course of the government's case which the court believed precluded any possibility of criminal liability. See also *United States* v. *Weissman*, 1924, 266 U. S. 377, 379.

In the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit.[2] Yet it must follow that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particular facts is correct, it can equally do so when its interpretation is incorrect. If a court truly lacked jurisdiction, that would be one thing, but given power to decide, there must be power to decide erroneously. Therefore the question must be, was the nature of the ruling that the court made

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[2] There is some suggestion in the court's opinion that Fed. Rule of Crim. Procedure 29(a), 18 U.S.C., permitting the court to acquit at the close of the government's evidence and allowing the defendant to move at that time without resting, impliedly indicates that the court may not acquit at any earlier stage. The rule contains, however, no positive prohibition to that effect. I believe the rule merely recognizes a common practice, and encourages it by not restricting the right of the defendant to move. See 5 Moore, Federal Practice ¶50.01 [2] (2d ed. 1951).

here so different that it must be said that the court was entirely without the power to make it.

There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating[3] as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte United States*, 1932, 287 U. S. 241, seems a far cry from saying that it cannot, in a bona fide attempt to weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.[4]

Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become abso-

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[3] The district court here (wrongfully, I agree) asserted that the witnesses continually and fundamentally contradicted themselves.

[4] Even accepting in full the government's suggestion that it is entitled to a trial by jury, such trial traditionally includes the right of the court to conclude that the evidence does not warrant submission. See *Patton* v. *United States*, 1929, 281 U.S. 276, 288.

lute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense that it could not cure the defect. To say that this was done without sufficient consideration is not to say that it was done without power. I believe the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind.

However, I think that a different question is raised by the other possible reason for the acquittal, the conduct of the Assistant U. S. Attorney in speaking to his witness during the recess. Here the court's assumption, *arguendo,* (note 5) is that " a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." I find it difficult to imagine circumstances warranting such an assumption. *Cf. Caldwell* v. *United States,* D. C. Cir., 1953, 205 F. 2d 879, 881 n. 11, *cert. den.,* 349 U. S. 930. But in all events I agree with the court that it is totally inapplicable.

It must be conceded that it was within the power of the district court to determine, however erroneously, that the conduct of counsel was improper. But I do not think it follows automatically that the court had power to acquit for that same reason. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *Maguire* v. *United States,* 1927,

273 U. S. 95, 99. When a court acquits in the middle of the government's case because of what it believes to be an incurable defect in the evidence, it has made a judgment on the government's case as a whole. A ruling of misconduct, however, is only a judgment as to the procedure in the particular trial. What corrective steps the court should take after its determination of a procedural error is a separate question. To make the same assumption that the court makes in its opinion, that "deliberate," "outrageous" misconduct which would project its unfairness into a future trial would warrant an acquittal forthwith, does not advance the matter, because that is far from our case. The district court made it abundantly clear that the error, as it considered it, committed by the Assistant U. S. Attorney was based upon ignorance of the court's rule,[5] and was anything but deliberate. Nor was any question of prejudice to the defendants possibly involved. The only testimony which the witness had changed as a result of conferring with counsel was the date of a particular conference. The date was a preliminary matter. Nothing about the conference had been admitted in evidence. The present effect of this new testimony upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any future evidence relating to this as yet undisclosed conference. Prejudice to the defendants was accordingly nonexistent.

Under these circumstances I do not think the court had any more power to order an acquittal than it would have

[5] An understandable ignorance, since twice before during the trial the court had expressly invited a government witness to confer with counsel during recess about his testimony, and in one instance to "rehearse it with counsel."

had on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial.

While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. See, *e.g.*, *Green* v. *United States*, 1957, 355 U. S. 184, 216-19 (Frankfurter, J., dissenting). In some instances this has been permitted to override what, strictly, is a second jeopardy, or at least an extended jeopardy. *Cf. Wade* v. *Hunter*, 1949, 336 U. S. 684, 688-90; cases collected in *United States* v. *Gori*, 2 Cir., 1960, 282 F. 2d 43, 48 (dissenting opinion), *cert. granted* 12/12/60. Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it,[6] should deprive the government of its day in court. This may be an exceptional ruling, but this is an exceptional case.

Since I think different consequences flow from the two suggested grounds of the district court's acquittal, it is essential to determine, if possible, which one was the actual basis of its action. With all respect, I do not share the court's expressed uncertainty. As soon as it appeared why the witness had changed his testimony the district court excused the jury and asked the Assistant U. S. At-

[6] Unless one wanted to say it was to teach government counsel a lesson for not knowing the rules—which is scarcely a judicial function. It would be doubly inappropriate here in view of the court's prior instructions. See n. 5, *supra*.

torney, "As a matter of personal privilege do you want to make any statement?" The court stated that in talking to his witness counsel had violated an "elementary rule," and that it was "interested in whether this is a situation in which I must respond to a motion." The court then described counsel's conduct as "a violation of civil liberties." Subsequently the court called the jury, stated that counsel were acting "subjectively in good faith [but that] the standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution." It is true that thereafter the court mentioned the government witnesses' "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations," and discussed the case generally. But it returned at some length to counsel's conference with the witness, discussed extorted confessions, unlawful search and seizure, and "the duty of a court to see that every man gets a fair trial," and concluded, "Bearing in mind these principles, and responding to the motions for acquittal made by counsel . . ., I direct you at this stage to return the verdicts of acquittal. . . ."

It may be that the district court would not have conceived of this "elementary rule" if it had not already been annoyed with the believed testimonial deficiencies of the witnesses, but I have no reluctance in concluding that the reason it granted the motions for acquittal was the same one that caused it to invite them—namely, counsel's violation of the "rule." Accordingly, I concur in the judgment of the court.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5755 Original.

In the Matter of

UNITED STATES OF AMERICA,

Petitioner.

ORDER OF COURT

February 2, 1961.

This cause came on to be heard on petition for writ of mandamus and was argued by counsel for petitioner and for intervenors,

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for a writ of mandamus is granted and the writ is hereby issued directing that the judgment of acquittal entered in United States v. Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as Cr. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.

By the Court:

ROGER A. STINCHFIELD, Clerk

By /s/ DANA H. GALLUP
Chief Deputy Clerk.

Appendix C

A true copy

ROGER A. STINCHFIELD, Clerk

Attest: By /s/ DANA H. GALLUP
Chief Deputy Clerk

[Cert. cc. Honorable Charles E. Wyzanski, Jr., Clerk
D. C., Mass., and Messrs. Richardson, St. Clair
Angoff.]

APPENDIX D

EXCERPTS FROM THE RECORD OF THE TRIAL PROCEEDINGS

1. Direction by the Court to the jury to return verdicts of acquittal. (Tr. 714-718)

2. Conference at the bench on September 14, 1960 in which the Court recommended that the United States Attorney *nolle prosse* the case against the defendants. (Tr. 370-384)

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1. *Direction by the Court to the jury to return verdicts of acquittal.* (Tr. 714-718)

The Court: Will you call the Jury, and the witness will take the stand.

(The Jury returns to the court room, and the witness résumes the stand.)

The Court. Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be

concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner,

you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner because the government has the burden of proof beyond a reasonable doubt."

And though that story may seem to you to be humorous, I think you will also say that it has considerable application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you can't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any

rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extrordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every

guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

(The Court then heard requests of Jurors to be excused.)

The Court: The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

ADJOURNED

2. *Conference at the bench on September 14, 1960 in which the Court recommended that the United States Attorney nolle prosse the case against the defendants.* (R. 370-384)

The Court: The jury is excused.

(The jury leaves the court room at 10.55 a.m.)

The Court: . . .

First of all, I am going to ask Mr. Caner and Mr. Mitchell: is there any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand, Mr. Palliotto?

Mr. Caner: There is one, yes, your Honor.

Appendix D

The Court: Is he one whose credit in your opinon will stand better after examination than this witness' credit?

Mr. Caner: I think his credit will be good, your Honor.

The Court: I didn't ask you that.

Mr. Mitchell: Your Honor, I think that Mr. Palliotto is just a little confused.

The Court: A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol prosse the case.

Mr. Caner: If the Court please, this witness was put on to testify simply to give explanatory material. This witness was not put on at this stage to testify to any matters concerning the fraud. It may be, and it obviously is, that his explanations have not been as clear as they might be. But, if the Court please, he is not our principal witness by any stretch of the imagination.

The Court: There are all kinds of character in a lawyer. One of them is the kind of character which enables him to realize in what situation a witness for whom he is not responsible has placed his case, and it is the responsibility of the United States Attorney and his assistants to reflect whether the great interests of justice, which are their primary concern, are served by a prosecution which depends upon a witness of the character that this witness has revealed on the stand.

I will take a 15-minute recess for the purpose of enabling the United States Attorney and his assistants to consider

whether the public interest is served by a further prosecution of this case.

(Recess.)

[Jury excused.]

[Conference at the bench at which the following was recorded:

The Court: I note that Mr. Richardson has joined the government counsel, and I am going to undertake very briefly to state to him as well as to other counsel why I have done the, for me, entirely unprecedented thing of asking the United States Attorney to consider whether to nol pros the case at this stage.

The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto, who is on the stand.

A judge ought not to deceive himself into believing that he knows how a jury will act. Yet I feel reasonably confident, and I believe my confidence is shared by Mr. Duwan, the Clerk, who has sat through the trial and who is, like myself, a neutral and a person of some experience in the court, that there is no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Palliotto.

I make no statement as to whether the defendants are guilty or not guilty, and I will make it clear that I am in no way casting any reflection on the United States Attorney or any of his assistants, including most specifically Mr. Caner and Mr. Mitchell. I am not doubting any of the

proceedings before the Grand Jury. I am looking merely at the situation in which this Court and Jury are presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness of the proceedings in which he, and more particularly the defendants, find themselves.

If it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said. On one occasion he will give an answer in the affirmative, and a few minutes later when the situation is really not changed in any respect he takes a diametrically opposite position. He seems not to realize the ambiguity his testimony has created. He seems to be unresponsive to repeated warnings by the Court that there could be no more serious matter than the offering of testimony in a criminal case, and that the witness should pause and reflect if he is in doubt, but should not plunge himself and the rest of us into a series of confusions.

So far as his narrative ability goes, he has been responsible for some of the most humorous blunders that I remember. He referred to the signals which were being given by Exhibit 1, the radiosonde, as "spurious." What he meant, as it finally developed, was that they were signals which were given on the spur of the moment, that is to say, instantaneous. The misuse of the word "spurious" in a case in which one of the important allegations in the indictment is that there were frauds committed upon the

government in connection with the testing system, rises to a degree of risk to the defendants to which they ought not to have been subjected.

I am not in any way intimating that this was the fault of the United States Attorney or his assistants. It just stands as a dramatic instance of the unawareness of the witness as to what his testimony means in a case like this.

Again a strange misuse of language, which I think did not prejudice, was his reference to "virgin women's hair," by which he meant the hair of a woman which was not dyed.

A witness who has so little understanding of the language and who has so frequently made utterances which have confused the Court, and I feel quite certain the Jury, is a very slender reed on which to make a man's fate depend.

Now, I know I have heard only four days of testimony, and I am aware that sometimes, as Thomas Dewey as District Attorney illustrated, one must secure convictions on the testimony of prostitutes, pimps, and worthless people. One may have no choice but to proceed on the basis of persons of poor character and worse reputation. But in general when such convictions have been secured they have been because though men and women have been worthless outside the court room, they have seemed to be creditable or worth believing in the court room.

I can't feel that any trust could be placed in this witness, and if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict which could be

granted full credit as being a verdict based upon evidence beyond a reasonable doubt.

Mr. Duwan, have I really overstated your position? Never mind whether you agree with every paragraph I have said, but have I overstated your position?

Mr. Duwan: No, not at all.

Mr. Richardson: May I comment briefly before I ask Mr. Caner to comment on the basis of his more detailed knowledge of the government's case?

I think in the first place we should make it clear that this witness was called for a limited purpose not central to establishment that wrongdoing had occurred. As I understand his testimony, it was to have attempted to explain the nature of the tests that were to be used under the terms of the government's contract on procuring these radiosondes.

The government would rely entirely on other witnesses to show that those tests were not carried out, and in fact they were falsified.

We believe, therefore, that whatever the Jury's impression of this witness generally, that its judgment as to whether the defendants are guilty would and should rest upon testimony of witnesses who will testify that under the instructions of the defendants they did not follow the procedures prescribed and that they in fact falsified those procedures.

Would you like to supplement that, Mr. Caner?

Mr. Caner: I would like to say that I think the case could well have proceeded by introduction of the documents, particularly the specification, which set forth the

test procedures, and then the fraud witnesses could have been called. My purpose in calling Mr. Palliotto was to explain just how primarily the testing procedures were supposed to work, because it did not seem to me that by just simply reading the printed document the Jury could understand how the test procedures were supposed to be operated.

The Court: Mr. Caner, you are not on trial. I don't want you to think I have made any criticism of the way you choose to present the matter.

Mr. Caner: I don't infer that. I address myself to the point that this witness' testimony is not material to anything relating to the fraud charged in this case. The witness was called to explain it. He has not done a good job of explaining, I grant you that, but the specifications themselves set up the procedure. I think that at least the way the test was supposed to have been operated has been explained, perhaps not perfectly, but it has been explained, and even if it hasn't been explained it is set forth in the specifications.

This witness was not to be our primary witness. I had not anticipated by any stretch of the imagination that he would take this long. The fraud witnesses are here, they have been here for many days, they are the ones who will prove the case against the defendants.

The Court has not heard one-tenth of the testimony in this case, and none of the fraud testimony. I do not think that this witness' testimony has to be believed in any degree in order for a conviction to stand, because the documents, as I say, do speak for themselves as to the test procedure, although not well enough to instruct the Jury, not knowing the instrument, just how test procedures were conducted.

Therefore, it is my view that the witness' testimony is not material to the fraud, and that I would be derelict in my duty in not proceeding with the case.

Mr. Richardson: I might add that I did keep in fairly close touch with the presentation of this case to the Grand Jury, and would simply like to underline in the light of that degree of exposure to the case that what Mr. Caner says about the importance to the government case of the fraud witnesses who have not yet been heard, is basic, and I therefore feel that to draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court and Jury the evidence on which the Grand Jury proceeded in charging these defendants.

The Court: I want to make it absolutely clear that I am going to allow the government to go ahead. I want further to make it absolutely clear that neither now nor previously have I intended to suggest that the defendants are innocent or not guilty. Neither now nor previously have I intended to suggest that the Assistant United States Attorney, Mr. Caner, or the Assistant United States Attorney, Mr. Mitchell, or anybody else, has been at fault or negligent, or failed to exercise such professional skill as the case required.

All that I have said is that regardless of what other witnesses testify with respect to the merits of the alleged fraud, I do not believe that there is a chance that this Jury will convict these defendants, and that you can suppose that Mr. Duwan and I have at least sat often enough in criminal cases to know that whether the United States Attorney was innocent or not, whether he was skillful or not, the

impression created is now ineradicable in our view. Isn't that right, Mr. Duwan?

Mr. Duwan: So far.

Mr. Richardson: With full deference to Mr. Duwan, and conceding that a jury asked now to vote—

The Court: I didn't say asked now. I am talking about whether it will be overcome.

Mr. Richardson: I think they may feel when they have heard the fraud witnesses that the perspective that they then have on the testimony of this witness is totally different.

The Court: The unfortunate thing from the government's point of view is that this witness has been on the stand now for four days. No one can overlook the fact that in spite of all instructions to jury, they don't hold their minds in absolute suspension, and no one can think the judges do.

Mr. Richardson: I might say in that connection that it had never been anticipated by the government that a witness called for such a purpose would be on the stand for this length of time, and in our view a great deal of the testimony that has been elicited during that period is not material to the government's case.

The Court: In my view the difficulty there would require me to make a professional comment, which I would rather not do, but I invite you to read the transcript.

Mr. St. Clair: The matter of procedure raises its head. I haven't examined this witness at all on any alleged fraud, because it was represented to me that he would be recalled for that purpose as a government witness. Now, if I understand he is not to be recalled for that purpose, I am going to spend the next couple of days with him on what he alleges

was the fraud, because he was the government man in charge.

The Court: That is quite correct. You were told, as I was told, that the witness would be called twice, once in connection with what was more or less background of the whole testing procedure, and once with respect to specific knowledge of specific fraud.

Mr. Caner: Yes, and we propose to do that, your Honor.

Mr. St. Clair: Then he will be called later with respect to the alleged fraud?

The Court: Yes. I am glad that the transcript is being typed out currently.

Mr. Richardson: I will look at it with interest, your Honor.

The Court: All right, bring the Jury down.]

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CRIMINAL No. 60-6-W

UNITED STATES OF AMERICA

vs.

STANDARD COIL PRODUCTS CO., INC,
FONG FOO, and ROBERT KNUPP

JUDGMENT OF ACQUITTAL

WYZANSKI, *J.* The defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

On September 20, 1960 upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

FURTHER ORDERED that each defendant be, and hereby is, discharged.

By the Court,

/s/ MIRIAM M. WYNN
Deputy Clerk.

/s/ WYZANSKI
U.S. D. J.

Judgment of Acquittal
entered—September 21, 1960